89-386

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,

– against –

PATRICK FEENEY,
Respondent.

PORT AUTHORITY
TRANS-HUDSON CORPORATION,
Petitioner,

– against –

CHARLES T. FOSTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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86P

QUESTIONS PRESENTED

1. Is the Petitioner, Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary of the Port Authority of New York and New Jersey, an agency of the States of New York and New Jersey, created by interstate compact to which Congress consented, prevented from interposing Eleventh Amendment immunity from suit in federal court against a claim brought pursuant to the Federal Employer's Liability Act simply because such a judgment would not be paid out of general state tax revenues?

2. Does a reference to federal judicial districts in the Port Authority suability statute's general purpose venue provision waive Eleventh Amendment immunity, in light of this Court's stringent standards for a finding of waiver?

TABLE OF CONTENTS

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Petitioner, the Port Authority Trans-Hudson Corporation, respectfully petitions for a writ of certiorari to review the judgments of the United State Court of Appeals for the Second Circuit in the above-captioned consolidated cases.

OPINIONS BELOW

The opinion of the Court of Appeals in *Patrick Feeney v. Port Authority Trans-Hudson Corporation* (App. A *infra*, A8-A21) is reported at 873 F.2d 628. The opinion of the District Court (App. A *infra*, A27-A44) is reported at 693 F.Supp. 34.

The opinion of the Court of Appeals in *Charles T. Foster v. Port Authority Trans-Hudson Corporation* (App. A *infra*, A24-A25) is reported at 873 F.2d 633. The District Court's opinion (App. A *infra*, A46-A50) is unreported.

JURISDICTION

The judgments of the Court of Appeals (App. A *infra*, A6-A7; A22-A23) were entered on April 26, 1989. The cases were consolidated by order of the Court of Appeals on May 9, 1989 (App. A *infra*, A5). A petition for rehearing was denied on June 6, 1989 (App. A *infra*, A1-A2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Portions of the Compact and subsequently enacted bi-State legislation, N.Y. Unconsol. L. §6101 *et seq.*; N.J.S.A. 32:1-1 *et seq.*, relied upon by the Court of Appeals below, are reproduced at App. B *infra*, A51-A55.

STATEMENT

The Port Authority of New York and New Jersey is a direct agency of the States of New York and New Jersey created by an interstate compact between them to which Congress consented (Ch. 154, Laws of N.Y., 1921; Ch. 151, Laws of N.J., 1921; 42 U.S. Stat. 174, 1921). The Port Authority, pursuant to the 1921 Compact and subsequently enacted bi-State legislation, operates various terminal, transportation, and other facilities of commerce in the statutorily defined Port District, including through its wholly-owned subsidiary, the petitioner Port Authority Trans-Hudson Corporation, the PATH interstate railway system. N.Y. Unconsol. L. §6601 *et seq.* (McKinney 1979 & Supp. 1988); N.J.S.A. 32:1-35.50 *et seq.* (West 1979).

The respondents in these consolidated cases are both employees of PATH, each of whom had sought damages pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §51 et seq. (1982). In each case, PATH moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings upon the ground that PATH enjoys Eleventh Amendment immunity from suit on FELA claims in federal court. The district court in each case granted PATH's motion.

The district court in *Feeney* held that under the reasoning of the Third Circuit in *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, ____ U.S. ____; 108 S.Ct. 344 (1987), the Port Authority was an arm of the state entitled to Eleventh Amendment immunity under the test laid down by this Court for determining such immunity – a finding which the district court found was fully applicable to PATH as the Port Authority's wholly-owned subsidiary (A43). In *Foster*, the district court

reached only the issue of waiver since PATH's status as a state agency had not been contested.

On the issue of waiver, both district courts examined the Port Authority's and, thus, PATH's suability statute to find that the statute contained neither an express nor an implied waiver of Eleventh Amendment immunity. Indeed, the district court in *Foster* examined the legislative history of the suability statute contained in the New York Legislative Annual and was able to conclude that the question of Eleventh Amendment immunity "was not addressed" (A49).

The Court of Appeals for the Second Circuit reversed both district courts, finding that PATH was not entitled to interpose Eleventh Amendment immunity, and remanded for further proceedings (A10, A18). The Court of Appeals held that the Port Authority and by extension PATH was not intended to be an agency for Eleventh Amendment purposes, although it acknowledged that the issue was, in its words, "close" (A16). The court also held that, in any event, the State Legislatures had both implicitly and explicitly waived Eleventh Amendment immunity in the Port Authority's suability statute (A16).

More specifically, the Second Circuit, in holding that PATH was not a state agency for Eleventh Amendment purposes, based its decision mainly on its determination that a monetary judgment against PATH would not be enforceable against New York and New Jersey (A14). The Second Circuit below deemed that factor to outweigh other indicators of state agency status named by the court, to wit: the method of appointment of Port Authority Commissioners and the gubernatorial veto over Port Authority actions (A15).

Second, the Court of Appeals held that the Legislatures of the States of New York and New Jersey had effected an "explicit waiver, *albeit* partial" (emphasis supplied) (A18) of Eleventh Amendment immunity by inclusion of a reference to federal judicial districts in the general purpose venue provision of the Port Authority's suability statute, reasoning that the reference to federal judicial districts otherwise would be meaningless (*Id.*). The Court of Appeals also held that there had been an implicit waiver of immunity in noting that the suability statute legislatively overruled, *inter alia*, the case of *Howell v. Port of New York Authority*, 34 F.Supp. 797 (D.N.J. 1940) which had held that the Port Authority was a state agency rather than a political subdivision, a "conclusion", the Court of Appeals reasoned, "that would support immunity under the Eleventh Amendment ...." (A17).

REASONS FOR GRANTING THE WRIT

POINT I

There Is A Direct Conflict Between The Second Circuit Below And The Third Circuit On This Issue Concerning The Very Same Agency.

The Second Circuit, in ruling that the Port Authority and, thus by extension, its wholly-owned subsidiary, Petitioner PATH, was not intended to be a state agency for Eleventh Amendment purposes, and further that, in any event, the State Legislatures had somehow both implicitly and expressly waived Eleventh Amendment immunity, has created a difficult and unusual situation. In view of the contrary Third Circuit decision in *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey* (*PBA*), 819 F.2d 413 (3d Cir. 1987), *cert.*

denied, ____ U.S. ____; 108 S.Ct. 344 (1987), the identical bi-State agency finds itself whipsawed by different determinations of its amenability to suit in federal court by the two federal judicial circuits in which it lies. Moreover, because of this Court's recent decision in *Will v. Michigan Department of State Police*, ____ U.S. ____; 109 S.Ct. 2304 (1989), the Port Authority is a "person" within the meaning of Section 1983 in one circuit but not in the other. 109 S.Ct. at 2311.

The Second Circuit acknowledges that its decision has created a direct conflict, in its own words,[1] on a "close issue" between it and the Third Circuit's decision in *PBA*, which, applying this Court's test of *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), held that the Port Authority is an arm of the State which enjoys Eleventh Amendment immunity.[2] Furthermore, in *Leadbeater v. Port Authority Trans-Hudson Corporation (PATH)*, 873 F.2d 45, 49 (3d Cir. 1989), the Third Circuit specifically held that the very same language, found in the instant case to be an explicit waiver of Eleventh Amendment immunity, did not constitute a waiver under the stringent test established by this Court.

Petitioner respectfully submits that the decisions of the Third Circuit in *PBA* and *Leadbeater* correctly resolved

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[1] Significantly, the Second Circuit also stated that this conflict was one "that can be resolved only by the Supreme Court." (A15).

[2] The Second Circuit's decision also directly conflicts on this issue with the decision of the Third Circuit sitting *en banc* in *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 663 (3d Cir. 1989) wherein the Court endorsed and reaffirmed its prior holding in *PBA*, *supra*, that the Port Authority is a state agency entitled to Eleventh Amendment immunity.

the issues before it. In sharp contrast, the Second Circuit's decision below, insofar as it relies almost exclusively upon the ground that a judgment against PATH would not be enforceable either against the State of New York or the State of New Jersey, constitutes a fundamental misinterpretation of Eleventh Amendment jurisprudence. So, too, its finding of both an implicit and explicit waiver of Eleventh Amendment immunity flies directly in the face of the pronouncements of this Court that waivers of Eleventh Amendment immunity must be unmistakable and clearly expressed.

A. The Second Circuit Misapplied This Court's Precedent In Finding That The Port Authority Was Not A State Agency For Eleventh Amendment Purposes.

The decision of the Second Circuit purports to analyze the question of Eleventh Amendment immunity under the factors delineated by this Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, *supra*, and indeed, the court below grudgingly had to acknowledge that the case for immunity on the part of the Port Authority was stronger than it was for the agency before this Court in *Lake Country Estates*. Nevertheless, the Second Circuit went on to hold "that the Port Authority, and therefore PATH, is not a state agency for Eleventh Amendment purposes," based on one factor, to wit: whether a judgment against PATH would put the "state treasury" at risk of liability. (A12).

By holding that the potential liability of the state treasury "is the single most important factor" (A14) to a determination of state agency status for Eleventh Amendment purposes, it is respectfully submitted that the

Second Circuit has misapplied this Court's decision in *Lake Country Estates*. This Court has never held such factor to be the *sine qua non* for immunity. Indeed, in *Lake Country Estates*, in commenting on this factor as but one of the factors to be weighed, this Court made the simple observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself", 440 U.S. at 400-01 (footnote omitted). Nowhere in the *Lake Country Estates* opinion, however, is there any indication that this factor is, *by itself*, controlling.[3] *Cf. Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 n.11 (1984), where this Court noted that suits against the sovereign are found not only where the judgment "would expend itself on the public treasury", but also where the public administration would be interfered with or a judgment would either compel or restrain the government in its actions, citing, *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In accord on this point: *Lewis v. Midwestern State University*, 837 F.2d 197, 199 (5th Cir. 1988), *cert. denied*, ____ U.S. ____; 109 S.Ct. 129 (1988); *Jensen v. State Board of Tax Commissioners*, 763 F.2d 272, 277 (7th Cir. 1985).

Quite obviously then, the Second Circuit's overemphasis on the "state treasury" factor represents a fundamental misinterpretation of Eleventh Amendment jurisprudence. The purpose of the Eleventh Amendment is not merely to protect "public" funds. If it were, cities or counties, whose funds are just as "public", would be entitled to invoke the

[3] Indeed, the court below had to acknowledge that the "state treasury" factor could not be "exclusively determinative" (A14). Yet, quite obviously, the court gave only lip service to this concept.

immunity. They are not. See, *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280-81 (1977); see also, *Fitchik*, 873 F.2d at 661. Rather, the Eleventh Amendment, as this Court has counseled time and again, is a recognition of state sovereignty as a limitation upon Article III judicial power.

Indeed, in *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), the case most often cited for the importance of the "state treasury" factor, this Court's focusing on the potential liability of the state treasury was for the purpose of determining who was, in fact, the real party in interest since individuals were the nominal defendants. Thus, this Court held:

> "And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (citations omitted) 323 U.S. at 464.

Similarly, in *Edelman v. Jordan*, 415 U.S. 651 (1974), *reh'g denied*, 416 U.S. 1000 (1974), cited by the Second Circuit for this proposition (A14), again the focus on the "state treasury" was for the purpose of identifying the real party in interest where state officials were the only named defendants.[4] Furthermore, both *Edelman* and *Ford* preceded

[4] The Court cites language in *Edelman* to the effect that:

> " '[T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.' 415 U.S. at 663." (A14).

(Footnote continued)

Lake Country Estates with its specific test for Eleventh Amendment immunity.

That the protection of state treasury funds is not this Court's raison d'etre for Eleventh Amendment immunity is also well-established by the fact that the Eleventh Amendment is not necessarily a bar to such funds being expended in an award of attorney's fees. See, *Kentucky v. Graham*, 473 U.S. 159, 170-71 (1985); *Hutto v. Finney*, 437 U.S. 678, 695 (1978). Nor is the Eleventh Amendment a defense when these funds are expended in obedience to the dictates of an injunction mandating that state officials conform their conduct to federal law. See, *Quern v. Jordan*, 440 U.S. 332, 338 (1979); see also, *Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

Thus, to the extent that the Second Circuit's decision focuses on the "state treasury" factor,[5] PATH respectfully

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While that proposition indeed is true, it does not necessarily then follow that if a judgment is not paid from the state's general tax coffers, Eleventh Amendment immunity cannot be found under *Lake Country Estates*, *supra*. Thus, at no time does PATH concede that the Port Authority's treasury, dedicated to state government purposes and legislatively constrained in its uses, is not a "state treasury" within the meaning of *Lake Country Estates*. See in this regard, the legislation establishing the Port Authority's General Reserve Fund, N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1979) which, in relevant part, dictates as follows:

> "Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states."

[5] Another factor the court below cites as militating against the Port Authority's state agency status is that one provision of the Compact

(Footnote continued)

submits that it nevertheless is inappropriately applied to disqualify an entity like the Port Authority, which, as found by the Third Circuit, otherwise "functions as an agency of the state . . . ." *PBA*, 819 F.2d at 417.

Thus, the Second Circuit reluctantly acknowledged but two factors, i.e., method of appointment of commissioners by the states and the gubernatorial veto, as evidencing state agency status (A13-A14). In contrast, the Third Circuit in *PBA* listed a host of additional "significant indicia of state control over the Authority", to wit: the requirement of annual reports to the state legislatures, the requirement of legislative concurrence to changes in Port Authority rules and regulations, the requirement of express legislative authorization for Port Authority projects, as well as other factors establishing that "the Authority is a direct agency of the states . . . ." 819 F.2d at 417 – all evidently disregarded by the Second Circuit below.

In point of fact, far from stressing the "state treasury" factor, this Court's opinion in *Lake Country Estates*, is, perhaps, more properly read as generally emphasizing, not surprisingly in view of the Eleventh Amendment's deference to state sovereignty, the intention of the state in creating the agency. See *Pennhurst*, "we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine' ", *supra*, at 100, citing *Hutto*, 437

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describes the Authority as a "municipal corporate instrumentality", N.Y. Unconsol. L. §6459 (McKinney 1979) (A13, A54). However, "municipal corporate instrumentality" is but one of many terms that have been used to describe the Port Authority. See *PBA*, 819 F.2d at 414-15. Indeed, in *PBA*, the Third Circuit was able to note that the "long-standing judicial characterization of the Authority [as a state agency] has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions. . . ." (matter in brackets added) 819 F.2d at 415.

U.S. at 691. Thus, this Court made clear that the task is to determine whether:

> "... there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose...." *Lake Country Estates*, 440 U.S. at 401.

See also, *Tuveson v. Florida Governor's Council on Indian Affairs*, 734 F.2d 730, 732 (11th Cir. 1984). The Third Circuit in *PBA*, *supra*, set out to do just that, and was able to conclude, after appropriately considering *all* the *Lake Country Estates* criteria that:

> "... although the Authority is no longer directly funded by the states, we conclude that the *history* of its financial structure, and the statutory constraints placed on the use of its funds, indicate that the Authority is considered an arm of the states by New York and New Jersey (emphasis supplied)." 819 F.2d at 416.[6]

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[6] In this regard, we note that the Second Circuit below has misinterpreted the Third Circuit's decision in *PBA* to the extent that it opined that the *PBA* holding was based on what it deemed to be an erroneous finding that two States were statutorily obligated to make appropriations should a judgment against the Port Authority deplete its resources (A15). That particular language in *PBA*, however, is just as consistent with a finding that the States, in carrying out their solemn obligations pursuant to the bi-State Compact, would make such an appropriation. In any event, the *PBA* decision in no way turns upon any such statutory obligation. In fact, the Third Circuit specifically noted that:

> "...the Authority's current funding structure *does not* provide conclusive evidence that the Authority is an agency of the state ....(emphasis supplied)" 819 F.2d at 416.

In sum, as the above cited language of *Lake Country Estates* makes plain, this Court has directed that the courts must ascertain the intent of the states in creating an agency when making a determination as to Eleventh Amendment immunity. In the case of the Port Authority, the requisite "good reason to believe" in that intent is self-evident. For irrespective of its modern fiscal structure or its current financial self-sufficiency, in creating the Port Authority in 1921, the States of New York and New Jersey, in fact, did create, and Congress consented to the creation of, an agency that was "totally immune from suit." *PBA*, 819 F.2d at 418; *accord*, *Howell v. Port of New York Authority*, 34 F.Supp. at 801; *Trippe v. Port of New York Authority*, 14 N.Y.2d 119, 123, 198 N.E.2d 585, 586 (1964).

B. The Second Circuit Ignored The Standards of This Court In Finding A Waiver of Eleventh Amendment Immunity.

As noted above, irrespective of the Port Authority's present financial self-sufficiency, in creating an entity totally immune from suit, the two states, by definition, intended to create an agency that shared their Eleventh Amendment immunity.

Thus, the question of whether PATH may interpose Eleventh Amendment immunity against a FELA claim devolves upon whether in 1951, some thirty years after the States created the Port Authority, the States waived Eleventh Amendment immunity in enacting the Port Authority's suability statute, N.Y. Unconsol L. §7101 *et seq*. (McKinney 1979) (A16).

The Second Circuit acknowledged that this Court's test for a waiver of Eleventh Amendment immunity is a stringent one:

> "We acknowledge that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985), *reh'g denied*, 473 U.S. 926 (1985), the Supreme Court stated that 'a State will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction' " ' (citation omitted). *See also*, *Edelman v. Jordan*, 415 U.S. at 673." (A16).

Nevertheless, the Second Circuit somehow concluded, again in direct conflict with the Third Circuit in *PBA*, 819 F.2d at 418, as well as in *Leadbeater*, 873 F.2d 45, that the Legislatures both implicitly and expressly waived the Port Authority's Eleventh Amendment immunity in the suability statute.

The Court of Appeals seems to be saying that the Eleventh Amendment was implicitly waived by the Legislature's inclusion of a reference to *Howell* in the legislative history of the suability statute (A17). *Howell*, however, was merely one case included in a long list of cases, which the Court of Appeals had to concede "appears to be exclusively sovereign immunity cases" (*id.*) in which:

> "the courts concluded that in the absence of an express consent by the states to suit against the Port Authority, the Port Authority shared the governmental immunity of the states themselves." 1950 N.Y. Legislative Annual 204 (footnote omitted).

The court went on to find that since "*Howell* concluded that the Port Authority was a state agency rather than a

political subdivision" (A17), the States therefore must have intended to waive the Eleventh Amendment immunity characteristic of a state agency. The Second Circuit's conclusion thus flies directly in the face of the well-settled principle, recently reiterated by this Court, that "a State does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts" (citation omitted), *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 473-74 (1987).

This Court's recent decision in *Dellmuth v. Muth*, ____ U.S. ____; 109 S.Ct. 2397 (1989) further demonstrates that the Second Circuit's reliance below upon the Legislative Annual's reference to the overturning of *Howell* is misplaced. As this Court stated in *Dellmuth*, with respect to Congressional abrogation of Eleventh Amendment immunity, for which unmistakably clear language also is required:

> "In particular, we reject the approach of the Court of Appeals, according to which, '[w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest.' . . . . Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of *Atascadero* will not be met (citation omitted)." 109 S.Ct. at 2401.

Similarly, these stringent standards for finding a waiver of Eleventh Amendment immunity do not support the Second Circuit's holding below (A17-A18) that the Legislature's attempt in N.Y. Unconsol L. §7106 (McKinney 1979)[7] to restrict *venue* to federal district courts lying within the Port District was an "explicit waiver, albeit partial" (A18), of Eleventh Amendment immunity.

In Leadbeater, *supra*, the Third Circuit answered the very same contention, to wit: that providing for venue in the federal judicial districts demonstrates an intent to waive Eleventh Amendment immunity. In rejecting that argument, the Court of Appeals noted:

> "The defendant suggests, in opposition, that the provision for venue in certain federal districts is intended to apply to actions over which there is some basis for federal jurisdiction independent of the consent provisions. It is not apparent to us that the venue provision applies in such cases, where consent to suit is not required. *But whatever the purpose of this part of Section 32:1-162, we think the Supreme Court, by requiring proof of consent by 'overwhelming implication,' mandates that there be much more than inclusion of*

[7] The text reads in relevant part as follows:

> "The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district established by one of said states or by the United States, and situated wholly or partially within the Port of New York District. The port authority shall be deemed to be a resident of such county or judicial district . . . ." (A54-A55).

> *a reference to a federal judicial district in a venue provision*." 873 F.2d 45, 49.[8] (emphasis supplied)

The Third Circuit in *Leadbeater* clearly is correct. Whatever may be the efficacy of the Legislatures' attempt in §7106 to control the choice of *venue*,[9] it strains credulity to believe that the Legislatures intended to do something as momentous as waive a constitutionally-protected right *sub silentio* merely by including a reference to federal judicial districts in a general purpose *venue* provision.[10] Quite obviously, the Legislatures can be presumed to have known how to consent to suit in federal court had that been their purpose. In fact, the language of the Legislative Annual cited above makes it perfectly clear that the question of Eleventh Amendment immunity was not specifically addressed.

In this regard, we note that this Court just recently took occasion to reiterate in *Welch*, *supra*, that:

[8] In this regard, it should be remembered that the parameters of Eleventh Amendment immunity were far less well-settled in 1950 than they are now. Indeed, it wasn't until *Welch*, *supra*, that this Court clearly overruled a precedent of nearly 25 years standing, *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), to the effect that Eleventh Amendment immunity could be waived merely by a state participating in a Congressionally-regulated activity. *Welch*, 483 U.S. at 478.

[9] But see, *Brophy v. Consolidated Rail Corporation*, Civ. A. No. 85-4201, 1986 W.L. 11686 (E.D. Pa.).

[10] It is more than evident that the venue language of §7106 is neither a consent to nor a waiver of anything. The waiver of sovereign immunity is contained in §7101. The subsequent provisions of the suability statute for the most part serve to condition and limit that consent. See, generally, *inter alia*, *Trippe*, 14 N.Y.2d 119, 198 N.E.2d 585 (1964); *Luciano v. Fanberg Realty Co.*, 102 A.D.2d 94, 475 N.Y.S.2d 854 (1st Dept. 1984). Thus, there is no basis for the Second Circuit's finding that §7106 effected a "partial" waiver of Eleventh Amendment immunity.

> " '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights,' *Edelman v. Jordan*, *supra*, 415 U.S., at 673, 94 S.Ct., at 1360." 483 U.S. at 473.

At bar, the court below had to concede that "use of the term 'venue' [in §7106] is somewhat anomalous in the Eleventh Amendment context" (A17). Thus, as the Third Circuit correctly determined in *Leadbeater*, *supra*, "somewhat anomalous" statutory language simply cannot satisfy the "express language" or "overwhelming implication" standards for Eleventh Amendment immunity established by this Court.

POINT II

This Case Presents an Important Issue of Law Which Has Engendered Considerable Confusion In The Courts of Appeals and Which, Therefore, Should Be Resolved by this Court.

As noted in Point I, *supra*, the conflict between the Second and Third Circuits has placed Petitioner PATH in a peculiar position – amenable to suit in one federal judicial circuit and not the other – a "person" within the meaning of §1983 in one jurisdiction and not in the other.

Obviously this untoward state of affairs with respect to a compact agency raises an important issue of public law which, as the Second Circuit itself recognized (A15), only this Court can resolve. In this regard we note this Court some time ago stated in another Eleventh Amendment matter:

> "The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3 , of the Constitution presents a federal question . . . Moreover,

> the meaning of a compact is a question on which this Court has the final say . . . ." *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 278 (1959).

Furthermore, in *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419 (1940), cited in *Petty*, this Court recognized that:

> ". . . questions of the construction of the Compact between states and of the jurisdiction of this Court . . . [are] of public importance." 310 U.S. at 427.

Quite apart from the particular discomfiture of Petitioner, however, it is self-evident that there has been considerable confusion among the lower federal courts over the proper application of this Court's *Lake Country Estates* standards which has affected or might potentially affect a myriad of agencies. The conflict between the Second and Third Circuits in the instant case over the "state treasury" factor is but one, if not the most glaring, example of this confusion.

Thus, in *McDonald v. Board of Mississippi Levee Commissioners*, 832 F.2d 901 (5th Cir. 1987), the Fifth Circuit, citing its earlier decision in *Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 414 U.S. 1059 (1986), denied immunity to the Board, stating that:

> ". . . because an important goal of the eleventh amendment is the protection of states' treasuries, the most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." 832 F.2d at 907.

However, just one year later in *Lewis v. Midwestern State University*, 837 F.2d 197, Point I, *supra*, another panel

of the Fifth Circuit rejected an argument that immunity could not exist because the judgment would be paid out of "non-state" funds. The Court noted:

> "We rejected a similar argument in *United Carolina Bank*. That case held that 'the eleventh amendment is not applicable only where payment would be directly out of the state treasury.' 665 F.2d at 560. Instead, the 'crucial question . . . is whether use of these unappropriated funds to pay a damage award . . . would interfere with the fiscal autonomy and political sovereignty of Texas.' *Id.* at 560-61." 837 F.2d at 199.

Similarly, in *Travelers Indemnity Company v. School Board of Dade County, Florida*, 666 F.2d 505 (11th Cir. 1982), *cert. denied*, 459 U.S. 834 (1982), the Eleventh Circuit Court of Appeals rejected a claim of immunity, noting:

> ". . . *Edelman* makes it clear that the Eleventh Amendment protection is available only if satisfaction of the judgment sought against the state 'agency' must under all circumstances, be paid out of state funds." 666 F.2d at 509.

Yet two years later in *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730, Point I, *supra*, that same Eleventh Circuit upheld a claim of immunity, holding:

> "Several courts of appeals have regarded the final actor, who ultimately pays, as the most crucial. This Court has stated the most important factor is how the entity has been treated by the state courts." (citations omitted) 734 F.2d at 732.

Moreover, it is respectfully submitted that firm guidance by this Court regarding what is the proper weight to be accorded to the "state treasury" factor will prevent in the future the fallacy the Fifth Circuit fell into in *Jacintoport, supra*, where in declining to reach the question of whether Eleventh Amendment immunity would exist if the defendant Port Commission could not satisfy the judgment, the court made a rather startling statement, to wit:

> "On the record before us, it appears that any judgment obtained by Jacintoport can be satisfied by the Commission itself . . . That record shows that even the most favorable estimation of Jacintoport's monetary damages does not reach a tenth of the Commission's surplus revenue in a 'good year' – of which it has had several recently. The State of Louisiana will not incur liability on this judgment's account. We specifically decline to reach the question of this Commission's immunity in an instance where the size and nature of the judgment sought would clearly result in liability for the state." 762 F.2d at 441.

With all due respect to the Fifth Circuit, as this Court held in *Lake Country Estates*, 440 U.S. at 401, an agency is either structured to be entitled to immunity or it is not. Sovereign immunity cannot be and simply is not a function of the size of the judgment being sought.

In view of the foregoing, it is clear that this case presents an important issue of public law engendering considerable confusion within and among the circuits and, thus, requiring resolution by this Court.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted.

Dated: New York, New York
August 31, 1989

Respectfully submitted,

JOSEPH LESSER
Attorney for Petitioner
Port Authority Trans-Hudson Corporation
One World Trade Center – 66N
New York, New York 10048
(212) 466-7361

On the Petition:
ARTHUR P. BERG
ANNE M. TANNENBAUM

APPENDIX

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the sixth day of June, one thousand nine hundred and eighty-nine.

PATRICK FEENEY,

Plaintiff-Appellant,

DOCKET NUMBER

v

88-7797

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant-Appellee.

[Filed June 6, 1989]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellee Port Authority Trans-Hudson Corporation.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

United States Court of Appeals
FOR THE SECOND CIRCUIT
[Filed May 9, 1989]

Charles T. Foster, Plaintiff-Appellant, -against- Port Authority Trans-Hudson Corporation, Defendant-Respondent.	88-7924 NOTICE OF MOTION *state type of motion* for Consolidation with P. Feeney v. PATH, Doc. No. 88-7797

MOTION BY:

Port Authority Trans-Hudson Corp.
One World Trade Center-66N
New York, New York 10048
(212) 466-7361
Anne M. Tannenbaum, Esq.
for Counsel

Has consent of opposing counsel:
A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? N/A ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: ____

OPPOSING COUNSEL:
Peter M.J. Reilly, Esq.
444 Main Street
P. O. Box 230
Islip, New York 11751
Peter M.J. Reilly, Esq.
of Counsel

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8) N/A

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:

Honorable Miriam Cedarbaum

Brief statement of the relief requested:

Consolidated with *Patrick Feeney v. Port Authority Trans-Hudson Corporation*, Docket No. 88-7797

Complete Page 2 of This Form

By: ***(Signature of attorney)***

/s/ Anne M. Tannenbaum

Signed name must be printed beneath

Anne M. Tannenbaum

Appearing for: ***(Name of party)***

Port Authority Trans-Hudson Corporation

Appellant or Petitioner:
☐ **Plaintiff** ☐ **Defendant**

Appellee or Respondent:
☐ **Plaintiff** ☒ **Defendant**

Date 5/1/89

ORDER

(Kindly leave this space blank)

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

/s/

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty sixth day of April, one thousand nine hundred and eighty-nine.

Present:

Hon. Amalya L. Kearse,

Hon. Ralph K. Winter,

Hon. Robert W. Sweet, DJ*

Circuit Judges,

PATRICK FEENEY,

Plaintiff-Appellant,
-v- 88-7797

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant-Appellee.

[Filed April 26, 1989]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

The mandate consisting of the items below, has been received. /____/Opinion/____/Order /____/Statement of Costs. Rec'd by EF, Date 6-25-89. Team #2

Elaine B. Goldsmith,
Clerk

/s/

Art Heller,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 711 August Term, 1988

(Argued February 8, 1989 Decided)

Docket No. 88-7797

PATRICK FEENEY,

Plaintiff-Appellant,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant-Appellee.

B e f o r e: KEARSE and WINTER, *Circuit Judges*, and SWEET, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York (Robert J. Ward, *Judge*) granting the defendant's motion for judgment pursuant to Fed. R. Civ. P. 12(c). We conclude that the immunity from suit in federal courts provided to the states by the Eleventh Amendment either does not extend to the defendant or has been waived. We therefore reverse.

---

*The Hon. Robert W. Sweet, United States District Judge for the Southern District of New York, sitting by designation.

RICHARD W. MILLER, Islip, New York (Peter M.J. Reilly, O'Hagan & Reilly, Islip, New York, of counsel), *for Plaintiff-Appellant.*

ARTHUR P. BERG, New York, New York (Joseph Lesser, Anne M. Tannenbaum, New York, New York, of counsel), *for Defendant-Appellee.*

WINTER, *Circuit Judge*:

The sole issue in this case is whether the Port Authority of New York and New Jersey ("Port Authority") is immune from suit in federal courts by virtue of the Eleventh Amendment.[1] We conclude that the Eleventh Amendment immunity either does not extend to the defendant or has been waived.

The appellant, Patrick Feeney, is an employee of the Port Authority Trans-Hudson Corporation ("PATH"), which operates rail facilities between New York and New Jersey and is a wholly-owned subsidiary of the Port Authority. Feeney brought this action for damages for personal injuries allegedly suffered in the course of his employment. He asserted these claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* (1982), the Boiler Inspection Act, 45 U.S.C. §§ 22 *et seq.* (1982), and the Safety Appliance Act, 45 U.S.C. §§ 1 *et seq.* (1982). PATH moved pursuant to Fed. R. Civ. P. 12(c) for dismissal of the complaint for lack of subject matter jurisdiction on the ground that PATH enjoys immunity from suit in federal courts because of the Eleventh Amendment. Judge Ward granted PATH's motion, and Feeney appeals. Feeney claims that the Port Authority is not a state agency for Eleventh Amendment purposes and, in the alternative, that, if it is such a state agency, its Eleventh Amendment immunity has been waived.[2] We agree with both arguments and reverse.

The claim that the Port Authority is not a state agency for Eleventh Amendment purposes requires that we examine it in some detail. The Port Authority is "a body corporate and politic" created in 1921 by an interstate compact between New York and New Jersey. The compact was approved by the United States Congress. N.Y. Unconsol. Laws § 6404 (McKinney 1979) and N.J. Stat. Ann. § 32:1-4

(West 1963 & Supp. 1988). The Port Authority is to "be regarded as the municipal corporate instrumentality of the two states for the purpose of develoing the port [of New York] . . .," N.Y. Unconsol. Laws § 6459 (McKinney 1979) and N.J. Stat. Ann. § 32:1-33 (West 1963 & Supp. 1988), and is authorized to:

> purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof: and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it.

(footnotes omitted). N.Y. Unconsol. Laws § 6407 (McKinney 1979) and N.J. Stat. Ann. § 32:1-7 (West 1963).

The powers of the Port Authority are exercised by twelve commissioners, six being selected by each of the participating states. N.Y. Unconsol. Laws § 6405 (McKinney 1979) and N.J. Stat. Ann. § 32:1-5 (West 1963). The Commissioners' actions are in turn subject to veto by the governor of either state. *See* N.Y. Unconsol. Laws § 7151 (McKinney 1979) and N.J. Stat. Ann. §§ 32:2-6 *et seq.* (West 1963 & Supp. 1988). The compact states that "[t]he [P]ort [A]uthority shall not pledge the credit of either state except by and with the authority of the legislature thereof." N.Y. Unconsol. Laws § 6408 (McKinney 1979) and N.J. Stat. Ann. § 32:1-8 (West 1963). *See also* 1930 Report of the Att'y Gen. 124 (bonds issued by Port Authority are not obligations of the state of New York). In the event the Port Authority's revenues are inadequate to meet its expenses, each state is obligated only to "appropriate, in equal amounts, annually, for the salaries, office and other

administrative expenses, such sum or sums as shall be recommended by the [P]ort [A]uthority and approved by the governors of the two states, but . . . only to the extent of one hundred thousand dollars in any one year." N.Y. Unconsol. Laws § 6416 (McKinney 1979) and N.J. Stat. Ann. § 32:1-16 (West 1963). The Port Authority may not incur any obligations for such administrative expenses until such appropriations are made. N.Y. Unconsol. Laws § 6418 (McKinney 1979) and N.J. Stat. Ann. § 32:1-18 (West 1963).

We conclude that the Port Authority, and therefore PATH, is not a state agency for Eleventh Amendment purposes. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Supreme Court held that the Tahoe Regional Planning Agency ("TRPA"), a bi-state authority established by California and Nevada to regulate the development of the Lake Tahoe region, was not a state agency for purposes of Eleventh Amendment immunity. The Court stated:

> By its terms, the protection afforded by [the Eleventh] Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."
>
> If an interstate compact discloses that the compacting States created an agency comparable to

> a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the State themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

Lake Country, 440 U.S. at 400-01. (footnotes omitted).

In denying the TRPA the protection of the Eleventh Amendment, the Court cited the following factors: (i) the compact referred to the TRPA as a political subdivision of the states; (ii) six of the ten governing members of TRPA were appointed by counties and four by the states; (iii) TRPA's funding was provided by counties, not by the states; (iv) TRPA's function, the regulation of land, is traditionally a function of local, not state, government; (v) the states had no veto over the actions of the TRPA; and (vi) TRPA's obligations were not binding on the states. *Id.* at 401-02.

Taking factors (i)-(v) into account, it appears that the case for denying Eleventh Amendment immunity to TRPA was stronger than is the case for denying it to PATH. Favoring non-application of the Eleventh Amendment immunity to PATH is the fact that the compact between New York and New Jersey describes the Port Authority as a "municipal corporate instrumentality," N.Y. Unconsol. Laws § 6459 (McKinney 1979) and N.J. Stat. Ann. § 32:1-33 (West 1963), language consistent with its being a political subdivision. Moreover, the Port Authority is to be self-sustaining financially, and its functions are localized and focus only on the port of New York. Favoring application are the facts that all of the Port Authority Commissioners are appointed by

the states, and the governors of the two states have a veto over the Commissioners' actions.

We do not believe, however, that the differences between the Port Authority and the TRPA constitute the requisite "good reason," *Lake Country*, 440 U.S. at 401, to conclude that the Port Authority was intended to be a state agency for Eleventh Amendment purposes. In particular, we believe that factor (vi), whether liability will place the state treasury at risk, although not exclusively determinative, is the single most important factor. *See Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 38 (2d Cir. 1977); *see also* Comment, *Eleventh Amendment Immunity and State-owned Vessels*, 57 Tul. L. Rev. 1523, 1528 (1983) (in determining whether to extend the Eleventh Amendment to a state agency "[t]he essential, but not exclusive, test is whether a monetary judgment against the agency would be satisfied out of the state treasury") (footnotes omitted). In cases where doubt has existed as to the availability of Eleventh Amendment immunity, the Supreme Court has emphasized the exposure of the state treasury as a critical factor. In *Edelman v. Jordan*, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974), for example, the Supreme Court stated that "[i]t is . . . well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. . . . [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663 (citations omitted); *see also Lake Country*, 440 U.S. at 400-01.

We believe it clear that a judgment against PATH would not be enforceable against either New York or New Jersey. The Port Authority is explicitly barred from pledging the credit of either state or from borrowing money in any name but its own. Even the provision for the appropriation of

moneys for administrative expenses up to $100,000 per year requires prior approval by the governor of each state and an actual appropriation before obligations for such expenses may be incurred. Moreover, the phrase "salaries, office and other administative expenses" clearly limits this essentially optional obligation of the two states to a very narrow category of expenses and thus also evidences an intent to insulate the states' treasuries from the vast bulk of the Port Authority's operating and capital expenses, including personal injury judgments. No provision commits the treasuries of the two states to satisfy judgments against the Port Authority, therefore. We believe that this insulation of state treasuries from the liabilities of the Port Authority outweighs both the methods of appointment and gubernatorial veto so far as the Eleventh Amendment immunity is concerned.

We realize that our holding creates a conflict between ourselves and the Third Circuit regarding PATH, *see Port Authority Police Benevolent Ass'n, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir.), *cert. denied*, 108 S. Ct. 344 (1987), that can be resolved only by the Supreme Court. That decision, however, was based on the Third Circuit's understanding that in the event that "a judgment were entered against the Authority that was serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses." *Port Authority Police Benevolent Ass'n*, 819 F.2d at 416. To the extent that this statement implies that the states *must* make such an appropriation, it appears to be in error. Under the compact, states are obligated to provide funds for Port Authority administrative expenses up to $100,000 only if their respective governors approve the request. Judgments in the present action thus cannot lead to a depletion of state treasuries without gubernatorial consent.

Although we would normally be most reluctant to create a conflict with another circuit on a close issue, we believe that the issue is not close in light of legislation enacted by New York and New Jersey stating that the Port Authority may be sued *in federal courts*. Even if the Port Authority enjoys Eleventh Amendment immunity, therefore, it has been waived. We turn now to that issue.

In 1950 and 1951 New York and New Jersey respectively enacted legislation that "consent[ed] to suits, actions or proceedings of any form or nature at law, in equity or otherwise . . . against the [Port Authority] . . ." N.Y. Unconsol. Laws § 7101 (McKinney 1979) and N.J. Stat. Ann. § 32:1-157 (West 1963). "Venue" for actions against the Port Authority consented to by this legislation, which include actions sounding in tort, expressly includes the federal courts. N.Y. Unconsol. Laws § 7106 (McKinney 1979) and N.J. Stat. Ann. § 32:1-162 (West 1963). The provision states in pertinent part:

> venue in any suit, action or proceeding against the [P]ort [A]uthority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district.

We acknowledge that the standard for determining whether a state has waived its Eleventh Amendment immunity is strict. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985), *reh'g denied*, 473 U.S. 926 (1985), the Supreme Court stated that "a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." ' " (citation omitted). *See also Edelman v. Jordan*, 415 U.S. at 673.

PATH argues that the language of the legislation in question is not sufficiently explicit to satisfy the test set out in *Atascadero State Hospital* and *Edelman*. Relying upon the Supreme Court's statement that " '[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued,' " *Welch v. Texas Dep't of Highways and Public Transportation*, 107 S. Ct. 2941, 2946 (1987) (citation omitted) (emphasis in original), PATH argues that the legislation governing the Port Authority's amenability to suit merely reflects the states' intention to waive the Port Authority's claim to sovereign immunity rather than its claim to Eleventh Amendment immunity.

PATH's argument, however, focuses solely upon the provisions allowing suits to be brought against the Port Authority, N.Y. Unconsol. Laws § 7101 (McKinney 1979) and N.J. Stat. Ann. § 32:1-157 (West 1963), and simply ignores the language of the legislation quoted above that expressly states that such suits may be brought in federal courts. Moreover, what legislative history there is indicates that his result was consciously intended. The 1950 New York States Legislative Annual thus refers to *Howell v. Port of New York Authority*, 34 F. Supp. 797 (D.N.J. 1940) as a decision that Section 7106 was designed to overturn. 1950 New York State Legislative Annual 203-04. In *Howell*, the court granted a motion to dismiss based on sovereign immunity and the Eleventh Amendment. Although the decisions cited in support of the dismissal appear to be exclusively sovereign immunity cases, *Howell* concluded that the Port Authority was a state agency rather than a political subdivision, a conclusion that would support immunity under the Eleventh Amendment. 34 F. Supp. at 800-01.

We concede that the statute's use of the term "venue" is somewhat anomalous in the Eleventh Amendment context. We conclude, however, that the use of that term in

no way undermines our conclusion that the provision evidences an intent to allow the Port Authority to be sued in the designated federal courts and is thus an explicit waiver, albeit partial, of the Eleventh Amendment. If such an intent is not attributed to the provision, then the provision is entirely meaningless. PATH's sole attempt to give meaning to the language in question is to argue that it relates to actions that may be brought in federal court where Congress has abrogated the Eleventh Amendment. PATH has failed to provide specific examples of any such cases, however. In any event, this argument is wholly unconvincing. First, it is inconsistent with the Legislative Annual's reference to *Howell*. Second, where Congress has abrogated the Eleventh Amendment immunity, states hardly need pass legislation waiving that abrogated immunity and have no power to determine the proper "venue" for actions brought pursuant to the abrogation.

We conclude, therefore, that the statutory provision establishing "venue" for suits against the Port Authority in United States courts is a waiver of the Eleventh Amendment.[1]

Reversed and remanded.

FOOTNOTES

1 The Eleventh Amendment provides

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Eleventh Amendment has been construed to prevent a state from being sued in federal court by one of its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

2 Feeney also claims that Congress abrogated PATH's Eleventh Amendment immunity when it enacted the FELA. We disagree. The effect of the FELA on PATH's Eleventh Amendment immunity is governed largely by *Welch v. Texas Dep't of Highways and Public Transportation*, 107 S. Ct. 2941 (1987). In that decision, the Supreme Court stated that abrogation of a state's Eleventh Amendment immunity requires that Congress "express[] in unmistakable statutory language its intention to allow States to be sued in federal court . . . ," *Welch*, 107 S. Ct. at 2947, and a " 'general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' " *Id.* (citation omitted). Applying this rationale to the Jones Act, the Court held that the statutory language extending that Act to " 'any seaman who shall suffer personal injury in the course of his employment,' . . . does not authorize suits against the States in federal court." *Id.* (citations omitted) (emphasis omitted).

The Court did not, however, limit its opinion to the Jones Act. Instead, it went on to overrule *Parden v. Terminal Railway of Ala. State Docks Dep't*, 377 U.S. 184,

reh'g denied, 377 U.S. 1010 (1964), a decision holding that Alabama had waived its Eleventh Amendment immunity when it decided to enter the railroad business subsequent to Congressional enactment of the FELA. The *Welch* Court clearly indicated that *Parden* should not be relied upon either to qualify or to limit the Court's deicision in *Welch*. The *Welch* Court thus was at pains to repudiate *Parden*'s conclusion that the FELA language applying it to "every common carrier by railroad" evidenced a Congressional intent to abrogate the Eleventh Amendment immunity. The Court stated that *Parden* reflected a "mistaken[] reli[ance] on cases holding that general language in the Safety Appliance Act . . . and the Railway Labor Act . . . made those statutes applicable to the *States*." *Welch*, 107 S. Ct. at 2947 (citations omitted) (emphasis added). The *Welch* Court further stated that " *Parden*'s discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law." *Id*. at 2948. Finally, the Court held that "to the extent that *Parden v. Terminal Railway, supra*, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." *Id*. (footnote omitted). Because the pertinent language of the FELA is no more specific than the language of the Jones Act regarding the Eleventh Amendment, a claim that the FELA abrogates PATH's Eleventh Amendment immunity is no longer sustainable.

3 PATH also relies on *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (per curiam), *reh'g denied*, 451 U.S. 933 (1981), which involved a suit brought by an association of nursing homes against an agency of the state of Florida. The association sought retroactive relief for the state's previous failure to reimburse the nursing homes as required by the state's participation in the federal Medicaid program. The

Supreme Court held that the Eleventh Amendment barred the suit. The Court stated that : (i) "the 'mere fact that a State participates in a program through which the Federal Government provides assistance . . . is not sufficient to establish consent on the part of the State to be sued in the federal courts' "; (ii) a "State's general waiver of sovereign immunity . . . 'does not constitute a waiver by the State of its constitutional immunity under the Eleventh Amendment from suit in federal court' "; and (iii) "the fact that the [State] agreed explicitly to obey federal law in administering the program can hardly be deemed an express waiver of Eleventh Amendment immunity." *Id*. at 150 (citation omitted). We fail to see the relevance of that holding in the context of a provision that expressly allows actions to be brought in federal courts.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of April one thousand nine hundred and eighty-nine.

Present: Hon. Amalya L. Kearse,
Hon. Ralph K. Winter, Circuit Judges.
Hon. Robert W. Sweet, District Judge.*

CHARLES T. FOSTER,
Plaintiff-Appellant,

-v.-

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Defendant-Appellee.

Docket No. 88-7924

[Filed April 26, 1989]

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

---

* The Hon. Robert W. Sweet, United States District Judge for the Southern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

Elaine B. Goldsmith,
Clerk

by: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 704 August Term, 1988

(Argued February 8, 1989 Decided APR 26 1989)

Docket No. 88-7924

CHARLES T. FOSTER,
Plaintiff-Appellant,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Defendant-Appellee.

B e f o r e: KEARSE and WINTER, *Circuit Judges*, and SWEET, *District Judge*.*

Appeal from an order of the United States District Court for the Southern District of New York (Miriam G. Cedarbaum, *Judge*) granting defendant's motion for judgment pursuant to Fed. R. Civ. P. 12(c). We conclude that the immunity provided to the states by the Eleventh Amendment does not extend to the defendant. We therefore reverse.

---

*The Hon. Robert W. Sweet, United States District Judge for the Southern District of New York, sitting by designation.

RICHARD W. MILLER, Islip, New York
(Peter M.J. Reilly, O'Hagan and Reilly, Islip, New York, of counsel),
for Plaintiff-Appellant.

ARTHUR P. BERG, New York, New York
(Patrick J. Falvey, Anne M. Tannenbaum, New York, New York, of counsel),
for Defendant-Appellee.

PER CURIAM:

This case raises precisely the same issue as that decided this day in *Feeney v. Port Authority Trans-Hudson Corporation*, No. 88-7797 (2d Cir. , 1989). We reverse and remand for the reasons stated in that opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK FEENEY,
Plaintiff,

– against –

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Defendant.

Judgment
87 Civ. 9256
RJW

[Filed August 12, 1988]

Defendant having moved for an order pursuant to Rule 12(c), Fed. R. Civ. P., and the said motion having come before the Honorable Robert J. Ward, U.S.D.J., and the Court thereafter on August 11, 1988, having handed down its opinion (#63009), granting defendant's motion for judgment on the pleadings and dismissing the action, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, N.Y.
August 12, 1988

/s/ Raymond F. Burghardt
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET
ON 8-15-88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK FEENEY,
Plaintiff,

– against –

PORT AUTHORITY TRANS-HUDSON CORPORATION,
Defendant.

Opinion
87 Civ. 9256 (RJW)

APPEARANCES

Peter M.J. Reilly
444 Main Street
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Attorney for Plaintiff

PETER M. J. REILLY, ESQ.
of Counsel

JOSEPH LESSER, ESQ.
One World Trade Center, 66S
New York, New York 10048
Attorney for Defendant

KEITH E. HARRIS, ESQ.
of Counsel

Ward, District Judge.

Plaintiff, an employee of the Port Authority Trans-Hudson Corporation ("PATH"), has brought this action against the railroad pursuant to the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51, the Boiler Inspection Act ("BIA"), 45 U.S.C. §22, and the Safety Appliance Act ("SAA"), 45 U.S.C. §1, for injuries arising from PATH's alleged negligence in maintaining safe working conditions. Defendant moves for judgment on the pleadings pursuant to Rule 12(c), Fed. R. Civ. P. For the reasons that follow, defendant's motion is granted.

BACKGROUND

On or about August 6, 1986, plaintiff avers he was injured at the PATH car shop in Jersey City, New Jersey. Plaintiff, seeking three million dollars in damages, alleges that his injuries resulted from the negligent and careless conduct of PATH's agents, servants, and employees in their railroad operations.

PATH operates an interstate commuter railroad between points in New York and New Jersey. It is a wholly-owned subsidiary of the Port Authority of New York and New Jersey. The Port Authority is a corporate body created by compact between the States of New York and New Jersey with the consent of the Congress of the United States.[1] PATH moves to dismiss pursuant to Rule 12(c), Fed. R. Civ.

[1] The Port Authority was created by an interstate compact entered into by New York and New Jersey in recognition of the fact that "the commerce of the Port of New York has greatly developed and increased and territory in and around the Port has become commercially one center or district." N.Y. Unconsol. Laws §6401 (McKinney 1979).

(Footnote continued)

P., on the ground that PATH, as a wholly-owned subsidiary of the Port Authority, is protected by the States' Eleventh Amendment immunity from suit in federal court without consent.

DISCUSSION

A motion pursuant to Rule 12(c), Fed. R. Civ. P., is designed to provide a means of disposing of cases when the material facts are not in dispute and judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice. 5 Wright and Miller, *Federal Practice and Procedure* ¶1367 (1973). A motion for judgment on the pleadings may be made at any time after the pleadings are closed and can raise several of the defenses enumerated in Rule 12(b), Fed. R. Civ. P.

In this case, defendant is raising a 12(b)(1), Fed. R. Civ. P., claim of lack of subject matter jurisdiction in its 12(c), Fed. R. Civ. P., motion.[2] In evaluating a motion under Rule

The statute provides:

> It is confidently believed that a better corodination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the state of New York and New Jersey.

Id., at §6401.

[2] Defendant styles this motion as one for judgement [sic] on the pleadings on the ground that the pleadings do not give the court subject matter jurisdiction. Rule 12(c), Fed. R. Civ. P., is generally used to secure a dismissal of a case on the basis of the underlying substantive merits of the claims and defenses revealed in the formal pleadings.

(Footnote continued)

12(b)(1), the complaint as a whole will be construed broadly and liberally, but argumentative inferences favorable to the pleader will not be drawn. 5 Wright and Miller, *Federal Practice and Procedure* §1350 (1973). In addition, the burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. *Id.* A case "should not be dismissed [under a 12(b)(1) motion] for want of jurisdiction except when it 'appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.' " *AVC Nederland B.V.* v. *Atrium Investment Partnership*, 740 F.2d 148, 152-53 (2d Cir. 1984) (quoting *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)). *See Albert* v. *Carovano*, 824 F.2d 1333, 1337-1338 (2d Cir. 1987); *Guilini* v. *Blessing*, 654 F.2d 189, 193 (2d Cir. 1981); *Morabito* v. *Blum*, 528 F. Supp. 252, 260 (S.D.N.Y. 1981). Here, because Plaintiff's claim is immaterial and frivolous if sovereign immunity applies to PATH, the court must determine to what extent PATH is protected from suit in federal court by the Eleventh Amendment.[3]

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5 Wright and Miller *Federal Practice and Procedure*, §1367, at 685. When using Rule 12(c), courts have applied the same standards for granting the appropriate relief as they would have employed had the motion been brought under Rules 12(b)(1), (6) or (7), Fed. R. Civ. P. *Id.* at 638. Rule 12(c), Fed. R. Civ. P., is appropriate for the instant case because the instant motion can be determined solely on questions of law and statutory interpretation.

[3] The immunity created by the Eleventh Amendment is not a "personal" defense, but a limitation of the jurisdiction granted to the federal courts by Article III of the constitution. The limitation deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding. *Pennhurst State School Hospital* v. *Halderman*, 465 U.S. 89, 98 (1984).

I. The Eleventh Amendment

> The Eleventh Amendment to the constitution provides:
>
> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

U.S. Const. Amend. XI.[4]

A literal reading of the Eleventh Amendment would solely preclude suits against a state brought by citizens of a different state, or by a citizen of a foreign state. While the Amendment by its terms does not bar suits against a state by its own citizens, the Supreme Court has consistently held that an unconsenting state is immune from suits brought in federal court by its own citizens as well as by citizens of another state. *Edelman* v. *Jordan*, 415 U.S. 651, 662 (1974) (quoting *Hans* v. *Louisiana*, 134 U.S. 1 (1890)); *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 (1973).[5]

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[4] The adoption of the Eleventh Amendment was in response to *Chisholm* v. *Georgia*, 2 U.S. 419 (1793). In *Chisholm*, a citizen of South Carolina was allowed to sue the State of Georgia under the provisions of Article III. Justice Iredell dissented asserting that Article III had not been extended to change the common law rule that a sovereign state cannot be sued without its consent. The Eleventh Amendment was adopted in 1798, within five years of the *Chisholm* decision.

[5] As the Supreme Court concluded in *Hans* v. *Louisiana*, 134 U.S. 1, 16 (1890) "[t]he suability of a state without its consent was a thing unknown to the law," and, accordingly, the authors of the Constitution could not have intended to confer jurisdiction on the federal courts to entertain lawsuits brought by individuals against unconsenting states.

A crucial issue with respect to Eleventh Amendment immunity is determining when a state is a party in interest. It is well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 663. Without question, a lawsuit is brought against a state for Eleventh Amendment purposes whenever the state or one of its agencies or departments is named as a defendant. *See Alabama* v. *Pugh*, 438 U.S. 781 (1978) (*per curiam*). This principle has been expanded to include suits against federally chartered corporations since 1900. *Smith* v. *Reeves*, 178 U.S. 436 (1900). In *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), the Supreme Court stated:

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Id. at 464. Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 663 (quoting *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944)). *See also Trotman* v. *Palisades Interstate Park Commission*, 557 F.2d 35, 38 (2d Cir. 1977).

The complaint in this action lists PATH, a wholly-owned subsidiary of the Port Authority, as the sole defendant. In *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, 108 S.Ct 344 (1987), the Third Circuit explicitly ruled that "the Port Authority is entitled to

Eleventh Amendment immunity." *See also Mineo* v. *Port Authority*, 779 F.2d 939, 949 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986) (holding that the Port Authority should be treated as a state for Tenth Amendment purposes). In *Port Authority Police Benevolent Association*, *supra*, 819 F.2d 413, the Third Circuit dismissed an action brought pursuant to 42 U.S.C. §1983 against the Port Authority on the ground that the Port Authority enjoys sovereign immunity.[6] The Court reasoned that under the Supreme Court test to determine the Eleventh Amendment immunity of a bi-state entity set forth in *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the Port Authority enjoyed such immunity.[7] The Court concluded

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[6] Discussing immunity, the Court stated:

> First, the Port Authority's twelve commissioners are appointed by the governors of each state and confirmed by the state legislatures. . . . Second, the functions performed by the Port Authority – are state functions (construction, maintenance and operation of highways, bridges and tunnels). . . . Third, the actions of the Port Authority's commissioners are subject to veto by the governors of either state and the Authority must hand in annual reports. *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, 819 F.2d 413, 417 (3d. Cir. 1987), *cert. denied*, 108 S.Ct. 344 (1987).

[7] The Third Circuit stated:

> We must determine whether such an interstate agency is an arm of the state immune from suit under the Eleventh Amendment, *See* U.S. Const. Amend. XI, or a "person" amenable to suit under section 1983. We conclude that, under the Supreme Court's decision in *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, . . . the Port Authority is entitled to Eleventh Amendment immunity. *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, *supra*, 819 F.2d at 414.

that, for Eleventh Amendment purposes, the Port Authority must be considered an arm or alter-ego of the state.[8]

As a wholly owned subsidiary of the Port Authority, PATH is entitled to the privileges and immunities of the Port Authority, including Eleventh Amendment immunity of a state from suit in Federal Court. *See* N.Y. Unconsolidated Laws §6612 McKinney (1979) ("Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities."). Inasmuch as the claim against PATH is for a monetary damages award that could ultimately be paid from the state treasury, New York State is the real, substantial party in interest and the Eleventh Amendment is implicated. *See Farid* v. *Smith*, No. 86-2007, slip op. at 4311-4312 (2d Cir. June 22, 1988) (Eleventh Amendment bars suit against state agencies if the state is the real party in interest).

Notwithstanding that an entity is an arm of the state protected by Eleventh Amendment immunity, the entity under certain circumstances can nevertheless be sued in federal court. Such a suit is permitted if Congress abrogates Eleventh Amendment protection in a federal statute, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976), or if a state explicitly waives its immunity and consents to suit in federal

[8] The rationale for the Court's decision was that if a judgment were entered against the Port Authority that was serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses. *See* N.J. Stat. Ann. 32:1-16 (West 1963); N.Y. Unconsol. Laws §6416 (McKinney 1979) (Compact Article XV). Accordingly, a judgment against the Port Authority could have some impact on the state treasury. *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, *supra*, 819 F.2d at 416.

court. *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 238 (1985) (citing *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883)). Therefore, the court must determine whether in this case the FELA permits a suit against a state in federal court or whether New York State has specifically given consent for a federal lawsuit in PATH's enabling legislation.

II. Congressional Abrogation of Eleventh Amendment Immunity

The first way in which a state may be subject to suit in federal court is where Congress abrogates a state's immunity by exercising its legislative powers to enforce the substantive provisions of the Due Process Clause of the Fourteenth Amendment. *See Atascadero State Hosp.* v. *Scanlon*, *supra*, 473 U.S. at 242.

The Supreme Court most recently discussed the nature of such abrogation in *Welch* v. *Texas Department of Highways and Public Transportation*, 107 S.Ct. 2941 (1987). *Welch* held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* at 2945 (quoting *Atascadero State Hospital* v. *Scanlon*, *supra*, 473 U.S. at 242 (1985)). The Court went on to point out that, with respect to the Jones Act, the waiver of immunity must be unequivocal:

> It is true that the Act extends to "*[a]ny* seaman who shall suffer personal injury in the course of his employment," §33 (emphasis added). But the Eleventh Amendment marks a constitutional distinction between the States and other employers of seamen. Because of the role of the States in our federal system, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."

Welch v. *Texas Dept. of Highways and Public Transportation*, *supra*, 107 S.Ct. 2947 (1937) (quoting *Atascadero State Hospital* v. *Scanlon*, *supra*, 473 U.S. at 246). The Court concluded that using the phrase "any seaman" did not express in unequivocal terms that it sought to include seamen employed by the state.

The Supreme Court in Welch explicitly overruled *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), the only significant case in which an employee of a state-operated railroad company was permitted to bring an action in federal court under the FELA absent unmistakably clear statutory language abrogating the state's sovereign immunity. In *Parden* v. *Terminal Railway of Alabama Docks Department*, *supra*, 377 U.S. 184, the Court reasoned that Congress evidenced an intention to abrogate Eleventh Amendment immunity by making the FELA applicable to "every common carrier by railroad while engaging in commerce between any of the several States." The Court concluded that the State of Alabama was therefore not protected by sovereign immunity.[9] *Id.* at 186. But in *Welch*, the Supreme Court acknowledged that the holding of *Parden* had subsequently been

[9] The court held:

> We think that Congress, in making the FELA applicable to "every" common carrier by railroad in interstate commerce, meant what it said. That congressional statutes regulating railroads whether they are state owned or privately owned is hardly a novel proposition. . . .
>
> If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the right of action created by the FELA, we should not presume to

(Footnote continued)

placed in doubt: "Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden's* discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law." *Welch* v. *Texas Dept. of Highways and Public Transportation*, *supra*, 107 S.Ct. at 2948. The Court refused to extend the reasoning of Parden to "infer that Congress in legislating pursuant to the commerce clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." *Id.* at 2948 (quoting *Employees* v. *Missouri Dept. of Public Health and Welfare*, *supra*, 411 U.S. at 285). Thus, to the extent that *Parden* v. *Terminal Railway*, *supra*, 377 U.S. 184, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, *Parden* has been overruled.[10]

> say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act. To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damage to injured employees but left one class of such employees — those whose employers happen to be state owned — without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result. We therefore read the FELA as authorizing suit in a Federal District Court against state-owned as well as privately-owned common carriers by railroad in interstate commerce.
>
> *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184, 188-90 (1964).

[10] Even before *Welch*, the Supreme Court had expressed the view that *Parden* was no longer good law. The Court had frequently stated that

(Footnote continued)

Welch v. *Texas Department of Highways and Public Transportation*, *supra*, 107 S. Ct. at 2948.[11]

Accordingly, the phrase "every common carrier by railroad" in the FELA cannot be considered an unequivocal statutory intent to include a common carrier by railroad owned by a state. This conclusion has also been reached by federal courts in New Jersey which, relying on *Welsh*, have recently dismissed several FELA claims against state-owned railroads, the Port Authority and PATH on the ground that waiver to be sued cannot be implied in the FELA.

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an unequivocal expression that Congress intended to override Eleventh Amendment immunity was required. *See Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985); *Pennhurst State School Hospital* v. *Halderman*, *supra*, 465 U.S. at 99; *Quern* v. *Jordan*, 440 U.S. 332, 342-345 (1979). The *Welch* court concluded that consent is crucial to sue the state:

> Thus, despite the narrowness of the language of the Amendment, its spirit has consistently guided this Court in interpreting the reach of the federal judicial power generally, and "it has become established by repeated decisions of the court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given . . . and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification."

Welch v. *Dept. of Highways and Public Transportation*, 107 S.Ct. 2941, 2950 (1987) (quoting *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 291-292 (1973)).

[11] Although PATH is involved in interstate commerce and railroad operations, a state does not waive its Eleventh Amendment immunity by merely participating in an activity funded or regulated by Congress. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). Waiver will not be inferred from participation unless Congress has made waiver a condition of participation. *See Atascadero State Hosp.* v. *Scanlon*, *supra*, 473 U.S. at 242.

In *Fitchik* v. *New Jersey Transit Rail Operations*, 678 F. Supp. 465, 469 (D.N.J. 1988), the court found that New Jersey Transit Rail Operations could not be sued pursuant to the FELA, or Federal Safety Appliance Act by an employee of the railroad because the state's absolute Eleventh Amendment immunity barred such suit. *See also Leadbeater* v. *PATH*, No. 86-5103, slip op. (D.N.J. April 13, 1988) (applying *Welch* to dismiss suit against PATH for lack of subject matter jurisdiction); *McIntosh* v. *Port of Authority of New York and New Jersey and Taglietta*, No. 86-2536, slip op. at 4 (D.N.J. April 6, 1988) (applying *Welch* to dismiss eight cases pending against PATH, the Port Authority and New Jersey Transit); *Rockwell* v. *New Jersey Transit Rail Operations*, 632 F. Supp. 280, 283 (D.N.J. 1988) (FELA does not set forth a clear and unmistakable intent on the part of Congress to abrogate a state's Eleventh Amendment immunity).

Thus, the first method of permitting a suit against a state in federal court, explicit waiver of Eleventh Amendment immunity by a Congressional statute, is not mandated by the language of the FELA.[12]

III. Waiver of Immunity by The State

The court must also examine the second way in which a state may be subject to suit in federal court. The principle of sovereign immunity can be limited by the state. Federal courts are free to entertain suits brought against states by individuals when the state has given its consent.

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[12] Although not raised by the parties, it is clear that neither the language of the SAA nor the BIA expressly abrogate Eleventh Amendment Immunity. *See McKenna* v. *Washington Metropolitan Area Transit Authority*, 829 F.2d 186, 188 (D.C. Cir. 1987).

If a state waives its Eleventh Amendment immunity, the suit is no longer barred. *See Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89 (1984).

The waiver of immunity, however, must be explicit and a federal suit cannot be based on a state's general consent to be sued in its own state courts. Waiver will be found only where it is stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable interpretation. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 651 (quoting *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151 (1909)). *See also Barrett* v. *United States*, No. 87-6189, slip op. at 5179 (2d Cir. August 2, 1988); *Minotti* v. *Lensink*, 798 F.2d 607, 610 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 2484 (1987).

The "unmistakably clear language" required for a waiver of Eleventh Amendment immunity is not found in the charter of PATH. The consent to suit provision of the Port Authority statute essentially empowers the Authority merely to sue and be sued.[13] In *Pennhurst State School & Hosp.*

[13] The Port Authority of New York and New Jersey's statutory consent to suit provides:

> Upon the concurrence of the state of New Jersey in accordance with section twelve §7117 hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five, inclusive, hereof.

N.Y. Unconsol. Law §7101 (McKinney 1979).
N.J. Stat. Ann. §32:1-157 (West 1963).

v. *Halderman*, *supra*, 465 U.S. 89, the Court declared that "[a] state's constitutional interest in immunity encompasses not only *whether* it may be sued, but *where* it may be sued." *Id.* at 99. The above waiver does not meet the "unmistakably clear language" requirement because "the Supreme Court has made it clear that the particular provision relied on must indicate the state's specific intention to be sued in federal court." *Atascadero State Hosp.*, *supra*, 473 U.S. at 241.

A number of federal courts have found that the use of a similar sue and be sued provision cannot be construed as waiving a State's Eleventh Amendment immunity from suits in federal court. In *Trotman* v. *The Palisades Interstate*

Prior to the promulgation of §7101, the Port Authority was considered entirely immune from suit. *See Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, *supra*, 819 F.2d at 418.

The Port Authority of New Jersey and New York's venue statutes provide:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the Port Authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The Port Authority shall be deemed to be resident of each such county or judicial district for the purpose of such suits, actions or proceedings. Although the Port Authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the Port Authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

N.Y. Unconsol. Law §7106 (McKinney 1979).
N.J. Stat. Ann. §32:1-162 (West 1963).

Park Commission, *supra*, 557 F.2d at 39, the Second Circuit interpreted the meaning of a sue and be sued clause in an interstate compact. Concluding that the interpretation of the clause would turn on federal law, the Court held that "we fail to perceive any reason why a bi-state commission cannot, when sued in federal court, enjoy the Eleventh Amendment immunity of its signatory states." *Id.* at 38. The court ruled that sue and be sued language in the Palisades Interestate Park Commission enabling statute could not be interpreted as giving individuals consent to sue the Commission in federal court. *See also Rockwell* v. *New Jersey Transit Rail Operations*, *supra*, 682 F. Supp. at 284 (New Jersey Transit statute conferring a capacity to be sued does not constitute a clear and unmistakable waiver of sovereign immunity).

Similarly, in *Port Authority Police Benevolent Association, Inc.* v. *Port Authority of New York and New Jersey*, *supra*, 819 F.2d at 418, the Third Circuit rejected the contention that language in the Port Authority statute constituting the capacity to sue and be sued abrogated the Port Authority's Eleventh Amendment immunity. *Id.* (citing *Florida Dept. of Health and Rehabilitative Serv.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981)).

District courts both in New York and New Jersey have relied on *Port Authority Police Benevolent Association, Inc.*, *supra*, to dismiss actions against the Port Authority and against PATH based on their Eleventh Amendment immunity from suit in federal court. *See e.g.*, *O'Donnell* v. *Port Authority of New York and New Jersey*, No. 84 Civ. 8188, slip op. at 6 (S.D.N.Y. September 3, 1987) (under the Eleventh Amendment the Port Authority is not amenable to suit); *Borough of Fort Lee* v. *The Port Authority of New York and New Jersey*, No. 87 Civ. 1238, slip. op at (D.N.J.

March 14, 1988) (consent statutes of Port Authority do not constitute an unequivocal waiver of immunity).[14]

This Court believes that PATH should be afforded Eleventh Amendment immunity. PATH is an alter-ego of the States of New York and New Jersey and, in the absence of an unequivocal waiver specifically applicable to federal court jurisdiction, the court declines to find that PATH has waived its constitutional immunity.[15]

CONCLUSION

The Court finds that PATH, a wholly-owned subsidiary of the Port Authority of New York and New Jersey, is a state entity. The FELA does not abrogate PATH's sovereign

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[14] The only case which can be interpreted as reaching a contrary conclusion is *Raysor* v. *Port Authority of New York and New Jersey*, 768 F.2d 34 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986). In *Raysor*, the Second Circuit permitted §1983 actions for false arrest and malicious prosecution to proceed on a theory of *respondeat superior* against the Port Authority since the Court found that New York and New Jersey had waived the Port Authority's immunity from such suits. *Id.* at 38. The Court believes that *Raysor* is not pertinent to this case because the question of Eleventh Amendment immunity and the need for an explicit waiver to bring suit in federal court appears not to have been directly addressed in *Raysor*. *See O'Donnell* v. *Port Authority of New York and New Jersey*, No. 84 Civ. 8188, slip op. at 6 (S.D.N.Y. September 3, 1987). Moreover, all recent cases have held that the Port Authority is not amenable to suit in federal court.

[15] Finally, plaintiff's argument that the dismissal of the action will deny plaintiff the equal protection of the laws and ignore the supremacy of the Federal Railroad Statutes is without merit. In *Ex parte State of New York*, 256 U.S. 490 (1921), and its progeny, it was clearly established that allowing Eleventh Amendment immunity for state owned businesses does not violate the equal protection of the individuals seeking to sue the state. *See Rockwell* v. *New Jersey Transit Rail Operations*, 682 F. Supp. 280, 284 (D.N.J. 1988).

immunity and PATH has not unequivocally consented to suit in federal court through its waiver statute. Therefore, PATH enjoys Eleventh Amendment immunity which deprives this court of subject matter jurisdiction to entertain the instant claim. Accordingly, defendant PATH's motion for judgment on the pleadings is granted and the action is dismissed.

It is so ordered.

Dated: New York, New York
August 11, 1988

/s/ Robert J. Ward
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES T. FOSTER

Plaintiff,

— against —

87 CIVIL 4593 MGC
JUDGMENT

PORT AUTHORITY TRANS-HUDSON CORP.

Defendant.

[Filed October 18, 1988]

Defendant( ) having moved for an order pursuant to Fed. R. Civil P. 12(c), and the said motion( ) having come before the Honorable Miriam Goldman Cedarbaum, U.S.D.J., and the Court thereafter on October 17, 1988, having handed down its memorandum opinion and order (#63274), granting defendant's motion for judgment on the pleadings, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, N.Y.
October 16, 1988

/s/ Raymond F. Burghardt
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 10/19/88.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES T. FOSTER,

Plaintiff,

– against –

87 Civ. 4593
(MGC)

PORT AUTHORITY
TRANS-HUDSON CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

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CEDARBAUM, J.

This is a suit brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, against the Port Authority Trans-Hudson Corporation ("PATH"). PATH is a subsidiary of the Port Authority of New York and New Jersey. PATH has moved pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings for lack of subject matter jurisdiction, on the ground that the Eleventh Amendment confers upon it immunity from suit in federal court. For the reasons discussed below, the motion is granted.

In *Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey*, 319 F.2d 413 (3d Cir.), *cert. denied*, 108 S. Ct. 344 (1987), the Third Circuit held that under the Supreme Court's analysis in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (*1979*), the Port Authority should be created as a state agency for purposes of the Eleventh Amendment. Defendant argues that the same principle applies to the Port Authority's subsidiary, PATH. *See* N.Y. Unconsol. Law § 6612 (McKinney 1979) ("Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities"). Plaintiff has expressed no disagreement with that position. Plaintiff's sole argument on this motion is that New York and New Jersey have waived PATH's Eleventh Amendment immunity.

In 1987, the Supreme Court in *Welch v. State Department of Highways and Public Transportation*, 107 S. Ct. 2941 (1987), explicitly overruled *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), which had held that an employee of a state-owned

railroad could sue the state in federal court under the FELA even though neither Congress nor the state had clearly expressed an intention to abrogate Eleventh Amendment immunity. Since the *Welch* decision, there have been several federal decisions dismissing FELA suits against PATH. *E.g.*, *Feeney v. Port Authority Trans-Hudson Corp.*, No. 87 Civ. 9256 (S.D.N.Y. Aug. 11, 1988); *McIntosh v. Port Authority of New York and New Jersey and Taglietta*, No. 86 Civ. 2536 (D.N.J. Apr. 6, 1988). None of those cases, however, has considered the statutory provision cited by plaintiff in this case.

Plaintiff relies primarily on N.Y. Unconsolidated Law § 7106. Even when read together with N.Y. Unconsolidated Law § 7101, the portion of section 7106 providing that the Port Authority may be held liable in "suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation" is insufficient to establish Eleventh Amendment waiver, since it does not specify an intention to permit suits in federal courts. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150 (1981) (per curiam); *Della Grotta v. Rhode Island*, 781 F.2d 343, 345-46 (1st Cir. 1986).

Section 7106 also contains the following venue provision:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county *or a judicial district*, establish by one of said states *or by the United States*, and situated wholly or partially within the port of New York district.

(emphasis added). In order for a state to waive Eleventh Amendment immunity, a statute must speak "in the 'most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Minotti v. Lensink*, 798 F.2d 607, 610 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2484 (1987), quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *see also Atascadero*, 473 U.S. at 238 n.1 (statute must provide "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). Defendant argues that this stringent test for waiver has not been met in this case. Without pointing to any examples, defendant contends that the portion of section 7106 providing for venue in a federal judicial district may be read as applying only to suits brought under statutes as to which Eleventh Amendment immunity has been abrogated – because of a congressional exercise of the powers of section 5 of the Fourteenth Amendment, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Title VII), or because of an explicit waiver by the states of New York and New Jersey.

Although the reason for the reference in section 7106 to a federal judicial district is far from clear, it is clear that the legislature of New York knows how to consent to suit in federal court if that is its purpose. It is difficult to believe that it would have chosen the indirect and ambiguous language of section 7106 if its intention had been to waive the Port Authority's Eleventh Amendment immunity. Furthermore, an examination of the legislative history of this statute shows an intention only to waive sovereign immunity. The Eleventh Amendment was not addressed. *See* 1950 New York State Legislative Annual 203-04.

For these reasons, defendant's motion for judgment on the pleadings is granted.

SO ORDERED.

Dated: New York, New York
October 14, 1988

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

COMPACT ARTICLE III

N.Y. Unconsol. L. §6404; N.J.S.A. 32:1-4

Port Authority of New York and New Jersey created

There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided. On and after July first, nineteen hundred seventy-two, the port authority shall be known and designated as "The Port Authority of New York and New Jersey."

COMPACT ARTICLE IV

N.Y. Unconsol. L. §6405; N.J.S.A. 32:1-5

Commissioners; appointment; term; removal

The port authority shall consist of twelve commissioners, six resident voters from the state of New York, at least four of whom shall be resident voters of the city of New York, and six resident voters from the state of New Jersey, at least four of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the state of New York and the New Jersey members by the state of New Jersey in the manner and for the terms fixed and determined from time to time by the legislature of each state respectively, except as herein provided. Each

commissioner may be removed or suspended from office as provided by the law of the state from which he shall be appointed.

COMPACT ARTICLE VI

N.Y. Unconsol. L. §6407; N.J.S.A. 32: 1-7

Powers of port authority; comprehensive plan for development of port

The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof:[1] and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it . . . .

COMPACT ARTICLE VII

N.Y. Unconsol. L. §6408; N.J.S.A. 32:1-8

Additional powers; reports; pledging of credit

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant

to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

COMPACT ARTICLE XV

N.Y. Unconsol. L. §6416; N.J.S.A. 32:1-16

Appropriations for expenses

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

COMPACT ARTICLE XVII

N.Y. Unconsol. L. §6418; N.J.S.A. 32:1-18

Incurring obligations for expenses

Unless and until otherwise determined by the action of the legislatures of the two states, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article fifteen,[1] prior to the making of appropriations adequate to meet the same.

N.Y. Unconsol. L. §6459; N.J.S.A. 32:1-33

Powers of port authority and municipalities in executing plan; securities tax exempt; limitations

* * *

"The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit or either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given."

N.Y. Unconsol. L. §7101; N.J.S.A. 32: 1-157

Consent to suits against the Port Authority

Upon the concurrence of the state of New Jersey in accordance with section twelve[1] hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority[2] (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five,[3] inclusive, hereof.

N.Y. Unconsol. L. §7106; N.J.S.A. 32: 1-162

Venue of action; consent to liability for tortious acts

The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New

York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings. Although the port authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the port authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

N.Y. Unconsol. L. §7151; N.J.S.A. 32: 2-6 et seq.

Action of commissioners to be approved or vetoed by Governor

Except as provided by this act,[1] no action taken at any meeting of the port of New York authority[2] by any commissioner appointed from the state of New York shall have force or effect until the governor of the state of New York shall have an opportunity to approve or veto the same under the provisions of article sixteen of the port compact or treaty entered into between the states of New York and New Jersey, dated April thirtieth, nineteen hundred and twenty-one.[2]